JD(SF)–39–05
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ARIZONA MECHANICAL INSULATION, LLC

and Case 28-CA-18622E

INTERNATIONAL ASSOCIATION OF HEAT
AND FROST INSULATORS AND ASBESTOS
WORKERS, LOCAL 73, AFL-CIO

John Giannopoulos, Esq., of Phoenix, AZ,
for the General Counsel.

Don A. Peterson, of Phoenix, AZ,
for the Charging Party.

Doug Tobler, Esq. of *Hammond & Tobler, P.C.*
of Phoenix, AZ for the Respondent.

SUPPLEMENTAL DECISION

Equal Access to Justice

Thomas M. Patton, Administrative Law Judge. On May 20, 2004, the National Labor Relations Board issued an Order in this proceeding, dismissing the complaint (the Decision). On June 8, 2004, the Respondent filed an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (herein EAJA), 5 U.S.C. Sec. 504, and Section 102.143 through 102.155 of the Board's Rules and Regulations. On June 15, 2004, the Board referred the matter to the undersigned for further appropriate action.

The application is verified by Monica Schwarz, a member of Arizona Mechanical Insulation, LLC (herein AMI), the Applicant. The application includes a sealed envelope labeled "Confidential Financial Information" that was served in accordance with Board Rule Sec. 102.147. Applicant's motion to withhold the balance sheet from public disclosure pursuant to Board Rule Sec. 102.147(g)(2) was granted on July 6, 2004.

The General Counsel timely filed a motion to dismiss the application with supporting argument. The Applicant filed a response to the motion with supporting argument and the General Counsel filed a reply. The motion to dismiss was denied. The General Counsel then filed a timely answer to the application and the Applicant filed a reply.

The General Counsel denies that the Applicant is EAJA eligible and contends that an EAJA award should be denied on the ground that the unfair labor practice proceeding was substantially justified.

I. Applicant's EAJA Eligibility

The standards for determining whether the Applicant is eligible to receive an EAJA award are found in Board Rule Sec. 102.143, which in relevant part provides:

> (c) Applicants eligible to receive an award are as follows:
>
> ...
>
> (5) any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.
>
> (d) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding.

The verified application states that Applicant is a limited liability corporation engaged in mechanical insulation; that at the time the charge was filed Applicant had two employees who were members of the Union; that the employees were working in southern Arizona; that Applicant has no affiliates; and that at the time the adversary adjudicated proceeding was initiated Applicant's net worth was less than $7 million. The application asserts that Applicant qualifies for an EAJA award. The financial information consists of a balance sheet in typical form. It details the assets, liabilities and equity of the Applicant. The balance sheet is on an accrual basis and reflects the situation as of March 31, 2003.

In her affidavit Monica Schwarz states, based on personal knowledge, that the facts stated in the application and the balance sheet are true and accurate.

The General Counsel denies that the Applicant is eligible to receive an EAJA award. The answer states:

> [The statement] that the Applicant is an eligible party under EAJA, is denied as the General Counsel is without sufficient knowledge or information to form a belief as to the truth of the allegation. In its application the Applicant has included a statement that its net worth is less than seven million dollars, and has provided a one-page balance sheet, which is under seal by order of the ALJ, to substantiate its assertion. However, the balance sheet does not satisfy the evidentiary requirements needed to properly authenticate such a document.

The answer does not otherwise explain the denial of EAJA eligibility. There is no showing of any objective basis for the asserted lack of knowledge. The issue of EAJA eligibility was not addressed in the motion to dismiss. In addition to the denial of the Applicant's statement regarding its EAJA eligibility, the answer separately pleads, as an affirmative defense, "The applicant does not meet the eligibility requirements for an EAJA award." The General Counsel has provided no explication of this affirmative defense.

In the its reply to the answer the Applicant's attorney reviewed the evidence it had submitted regarding the Applicant's EAJA eligibility and then objected to the answer as follows:

> If General Counsel has some secret reason for believing that the requirements have not been met, Applicant would be more than willing to provide any additional information that General Counsel believes is necessary. In the absence of General Counsel's candor on this subject, it is impossible to satisfy its unknown complaints.

The Applicant thus contends, in substance, that it was provided insufficient information to permit it to amend the application, if Applicant's assertion of EAJA eligibility was deficient. See *U.S. v. Hristov***,** 396 F.3d 1044 (9th Cir. 2005) and cases cited therein. See also *Scarborough v. Principi,* U.S., 541 U.S. 401 (2004).

The answer does not sufficiently describe deficiencies regarding the Applicant's EAJA eligibility. In this regard, Board Rule Sec. 102.150(c) provides, "The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel's position." Because the answer does not comply with the requirements of Sec. 102.150(c), I find that Applicant's EAJA eligibility is established.

Assuming, without deciding, that the merits of the Applicant's EAJA eligibility should be considered, I shall address matters that may be raised on exceptions, to avoid the necessity of a remand regarding this issue.

The somewhat cryptic assertion that the balance sheet does not satisfy the evidentiary requirements needed to properly authenticate such a document can be read as a contention that there is a requirement that document like the balance sheet be self-authenticating. That has never been an EAJA requirement and is not a basis for dismissing the application.

The affidavit of Monica Schwarz, based on her personal knowledge, that the balance sheet truthfully and accurately states the facts regarding the Applicant's business is sufficient to authenticate the balance sheet. Because of her role in the operation of AMI, Monica Schwarz would have personal knowledge of the truth of the contents of the balance sheet. She worked in the office in the Schwarz home and handled business matters for AMI and her husband worked with the tools. The balance sheet has been sufficiently authenticated by Monica Schwarz. Fed. R Evid. 901(b)(1); *Shell Ray Mining*, 297 NLRB 53 (1989).

The balance sheet is on an accrual basis and reflects the situation as of March 31, 2003. Board Rule Sec. 102.143(d) provides, "For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding . . . ." The rule does not require that the financial statement reflect the net worth on a particular day, so long as the financial statement and the other evidence show that the Applicant had a net worth of not more than $7 million on the day the complaint issued 88 days later. *Shell Ray Mining*, supra. While the balance sheet shall remain under seal, it is appropriate to disclose that the net worth of the applicant, however measured, was less than 1% of the $7 million EAJA limit on the day the charge was filed.[1] I conclude that the Applicant had a net worth of less than $7 million on the day the complaint issued based on the balance sheet, the verified application, the affidavit of Monica Schwarz, the evidence regarding the operations of the Applicant in the unfair labor practice case, the related findings in the Decision and reasonable inference.

[1] The measurement of net worth is discussed in *American Pacific Concrete Pipe*, 271 NLRB 117 (1984); reversed, *American Pacific Concrete Pipe Co., Inc. v. NLRB*, 788 F.2d 586 (9th Cir. 1986)

The application states that on the day the charge was filed the Applicant had two employees. As noted above, the affidavit of Monica Schwarz states, based on her personal knowledge, that the application truthfully and accurately states the number of employees. I conclude that the Applicant had no more than 500 employees on the day the complaint issued based on the verified application, the affidavit of Monica Schwarz, the findings in the Decision, the record from the hearing and reasonable inference.

Consideration has been given to affording the Applicant an opportunity to supplement the application to state the precise net worth and number of employees on the day the complaint issued, pursuant to Board Rules Sec.102.147(f) and Sec. 102.152(a). This procedure was not followed because it is obvious that the Applicant is EAJA eligible and the denial of knowledge and information by the General Counsel does not appear to be reasonably based.

Based on the foregoing, I conclude that the evidence shows that the Applicant is eligible for an EAJA award.

II. Substantial Justification

The Applicant is entitled to be reimbursed an award of attorney's fees and expenses unless the General Counsel has established that the issuance of the complaint and the subsequent litigation was substantially justified. The standards and authority for determining whether the Applicant is entitled to an EAJA award are summarized in *David Allen Co.,* 335 NLRB 783, 784-785 (2001):

> Under EAJA, a party who has prevailed in litigation before a Federal government agency is entitled to an award of attorney's fees and expenses incurred in litigation unless the government can establish that its position was "substantially justified." *Blaylock Electric*, 319 NLRB 928, 929 (1995). The United States Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552 fn. 2 (1988), defined the phrase "substantially justified" as meaning "justified to a degree that could satisfy a reasonable person" or "justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Further, the fact that the Government did not prevail on the merits does not give rise to a presumption that its position was unreasonable, and the "substantially justified" standard does not require the Government to establish that its decision to litigate was based on substantial probability of prevailing. *Carmel Furniture Corp.,* 277 NLRB 1105, 1106 (1985). The Government's position can still be deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima facie case. Id. However, where the General Counsel presents evidence, which, if credited by the fact finder, would constitute a prima facie case of unlawful conduct, the General Counsel's position is deemed to be substantially justified within the meaning of EAJA. *SME Cement, Inc*., 267 NLRB 763 fn. 1 (1983). Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in law and fact and is substantially justified. *Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984).

The only violation alleged was that the Applicant refused to execute or abide by a labor agreement negotiated in 2002 between Western Insulation Contractors Association (the Association) and International Association Of Heat And Frost Insulators And Asbestos Workers,

Local 73, AFL-CIO (the Union). The evidence did not establish that Applicant was bound by group bargaining and the complaint was dismissed. The General Counsel contends that the agency's position was substantially justified.

The EAJA issue is whether the agency's position that AIM had made a binding commitment to group negotiations was one "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552 fn. 2 (1988).

The General Counsel and the Applicant each acknowledge that the concurring opinion of Justice Stevens in *Charles D. Bonanno Linen Service, Inc.,* 454 US 404, 419-420 (1982) sets forth the standards for determining whether an employer or a union has made a binding commitment to group negotiations. See *Detroit Newspaper Agency*, 326 NLRB 700 (1998); *Painters Dist. Council 51 (Management Corp.),* 299 NLRB 618 (1990). In *Bonanno Linen* Justice Stevens wrote:

> The mere fact that an employer bargains in conjunction with other employers does not necessarily mean that it must sign any contract that is negotiated by the group. The Board requires that, to be bound by the terms of group negotiation, the members of an employer association must have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and the union representing their employees must [have] been notified of the formation of the group and the delegation of bargaining authority to it, and [have] assented and entered upon negotiations with the group's representative. (Internal quotation marks and citations omitted.)

The Decision dismissing the complaint includes the following findings:

> Monica Schwarz and representatives of five other employers attended the initial July 29 meeting. The initial meeting was at the union hall. Four of the six employers who participated in the July 29 meeting were WICA members. The attendance sheet that was signed by Schwarz at that meeting had "WICA" written at the top. Schwarz credibly testified that when she signed the attendance sheet she did not associate WICA with Western Insulation Contractors Association and that she was unfamiliar with the organization prior to the 2002 negotiations.

The General Counsel contends that if Monica Schwarz's testimony that she did not associate the WICA acronym with the Association when she signed the initial attendance sheet had not been credited, a violation would arguably have been found.

The General Counsel also points to the crediting of Schwarz's credited testimony that she was unfamiliar with the Association prior to the 2002 negotiations. However, the decision also notes that the only probative evidence that AIM possessed information regarding the identity of Western Insulation Contractors Association/WICA prior to the 2002 negotiations were the references to that organization in the "me too" agreements Monica Schwarz signed in 1999.

The issues of Monica Schwarz's mentally associating WICA with the Association when she signed an attendance sheet at the initial meeting and her familiarity with the Association prior to the negotiations were not substantial credibility issues. The testimony on these matters was of marginal significance in determining whether the evidence as a whole met the *Bonanno Linen* standards. *David Allen Co,* supra. I attached little significance to those matters and neither was an important factor in my concluding that AIM was not bound by group action. Cf. *Golden Stevedoring Co*., 343 NLRB No. 18, slip op. at 3 (2004). That testimony is not even

mentioned in the Analysis portion of the Decision. The decision was based on the objective evidence regarding an intent by AIM to be bound by group rather than individual action.

The complaint alleged and the answer denied that AMI was a member of the Association. Schwarz testified that AMI was never a member of the Association. Bryan E. Rymer, Jr., an official of the Association and the chief negotiator was a witness for the General Counsel. Rymer testified that AIM was not an Association member. There has been no showing that the government ever had any evidence that AIM was an Association member.

The complaint alleged and the answer denied that in September 1999, when AIM entered into an interim agreement with the Union, it agreed to be bound to future industry agreements, which were negotiated between the Union and Association. In fact, there was no arguable basis to contend that the terms of the interim agreement included an agreement by AMI to be bound to the 2002 Agreement. There has been no showing that the government ever had evidence to support such a contention. Indeed, the Decision only assumes, without finding, that the other employers that participated in the 2002 negotiations were bound by group action.

The General Counsel contends that evidence was presented that a reasonable person might accept as adequate to support the allegation that the applicant indicated an unequivocal intention to be bound by group bargaining. The "reasonable person" standard is not a subjective test. The General Counsel must show that the government's position had a "reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552 fn. 2 (1988). The position of the General Counsel is inconsistent with the requirement that an employer's intent to be bound by group bargaining be clear and unequivocal. Moreover, the General Counsel's argument is inconsistent with the Court's conclusion that absent "an unequivocal commitment to be bound by group action, an employer is free to withdraw from group negotiation at any time, or simply to reject the terms of the final group contract." *Charles D. Bonanno Linen Service, Inc.,* 454 US 404, 419-420 (1982).

Much of the General Counsel's argument on the EAJA question amounts to a contention that the unfair labor practice case was wrongly decided. In particular, the General Counsel contends that the administrative law judge misread and misapplied the case law relied on by the General Counsel. I find it unnecessary to expand on or further explain the decision.

The General Counsels contends that if the Applicant had made witnesses available during the investigation "perhaps a complaint may not have issued." General Counsel argues, based on *C.I. Whitten Transfer Co.,* 312 NLRB 28, 29 (1993), "Respondent cannot now rely on its own lack of cooperation to support its application for attorney's fees pursuant to Equal Access to Justice Act." The General Counsel does not identify how the decision to issue complaint might have been affected by such witnesses.

On June 3, 2003, during the administrative investigation, the assigned investigator sent a letter to AIM that stated in part:

> Along with providing a position statement and witnesses, you may also submit any other evidence, affidavits, or documents you consider relevant. However, providing affidavits not taken by a Board Agent does not constitute full cooperation within the meaning of the Equal Access to Justice Act. If you choose not to reply to this request, the Regional Director will make his decision based upon the evidence available. Accordingly, I ask that you present the evidence requested and any other evidence that you may wish to submit, including any relevant witnesses for the purpose of giving affidavits, by the close

of business on June 18, 2003, so that the Regional Director may consider such evidence.

June 18, Monica Schwarz responded with a three-page statement of position and 15 pages of exhibits. Schwarz closed with the following, “Feel welcome to contact me directly for additional information or clarification. I can arrange to meet with you personally to discuss the depth of our concerns further.” The record does not indicate that there was further communication with AMI before a decision was made to issue complaint. It was a four hour drive from Hereford to Phoenix and Schwarz was employed as a schoolteacher in Hereford. It was not unreasonable for Schwarz to try initially to resolve the charge by mail.

In any case, the rationale of *Whitten Transfer* has little relevance to the present case. Unlike the situation in *Whitten Transfer*, AMI did not withhold evidence that was then disclosed at the hearing to defeat the government’s case. The dismissal of the complaint against AMI was the consequence of an absence of substantial probative evidence that would establish a violation. An employer is not presumptively barred from receiving an EAJA award where witnesses are not made available for affidavits taken by a Board agent.

The dismissal was not based on any resolutions of disputed issues of fact. Rather, the decision was based on uncontroverted facts, which were known or should have been known to the Regional Office. The case did not turn on novel questions of law. The complaint was dismissed on the basis of settled decisional authority. I find that General Counsel's position was not reasonable in law or fact, and that there are no special circumstances that would make an award unjust.

III. FEES AND COSTS

Board Rule Sec. 102.145 provides in relevant part that awards will be based on rates customarily charged by attorneys, subject to a limitation of $75 per hour, plus reasonable expenses. The Applicant has submitted verified detailed billing statements of its attorney. AMI has been charged at an hourly rate of $250.00 per hour for attorney time and $200.00 for one hour of paralegal time. AMI has also been billed for expenses of postage, FedEx delivery, photocopying, parking, processor fees for subpoena service, messenger service and online legal research. The fees and expenses claimed were all incurred after the issuance of the complaint. The original application was supplemented to include fees and expenses incurred in the prosecution of the EAJA application, which are recoverable. See *DeBolt Transfer*, 271 NLRB 299 (1984)The General Counsel has not challenged the Applicant's fees and expenses. I have reviewed the fees and expenses sought and find that they are allowable under Board Rule sec. 102.145, subject to the $75 ceiling on attorney fees. The fee and expenses submissions and their supporting affidavits are made part of the record.

The Applicant has not made a request to the Board, by application for rulemaking or otherwise, for an increase in the allowable hourly rate of $75.00. Absent such a request and a favorable ruling by the Board, I am without authority to consider the Applicant's request for attorney's fees higher than the maximum provided by the EAJA and the Board's Rules and Regulations. Accordingly, I shall compute the Applicant's attorney's fees and paralegal fees at the hourly rate of $75.00. The allowed hourly rate is without prejudice to the Applicant to file a petition to raise the hourly rate, pursuant to Board Rule Sec. 102.146.

The attorney billing reflects the chargeable time in hours and tenths of an hour. The following is a summary of the hours billed, the allowable amounts based on an hourly rate of

$75.00 and the expenses claimed relative to defending the issues raised by the complaint and handling the EAJA application:

(1)	Attorney time	74.4	hours	$6330.00	
(2)	Paralegal time	1.0	hours	75.00	
(3)	Expenses--			1997.54	
	Total				$8402.54

ORDER

Arizona Mechanical Insulation, LLC shall be awarded $8402.54 pursuant to its EAJA application, as supplemented. [2]

Dated, San Francisco, California, May 12, 2005.

Thomas M. Patton
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.